1-29-2016

Wurdemann v. State Appellant's Brief Dckt. 43384

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN DAVID WURDEMANN,

Petitioner-Appellant-CrossRespondent,

v.

STATE OF IDAHO,

Respondent-Cross Appellant.

Supreme Ct. Docket No. 39173-2011
Canyon County No. CV-2003-4362

Supreme Ct. Docket No. 43384-2015
Canyon County No. CV-2003-4362

PETITIONER-APPELLANT'S
OPENING BRIEF

APPEALED FROM THE THIRD JUDICIAL DISTRICT
THE HONORABLE RENAE HOFF PRESIDED

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JURISDICTION

This Court has jurisdiction pursuant to the Uniform Post-Conviction Procedure Act (UCCPA), I.C. §§19-4901 et seq.

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioner-Appellant John David Wurdemann appeals from the denial of post-conviction relief by the district court, Third Judicial District. Wurdemann's conviction was vacated upon a Rule 60(b) motion. (*See* Attachment A (Canyon County case no. CV-2003-4362, Judgment filed July 21, 2015)). The State is appealing that order in the companion case captioned above. Thus, Wurdemann appeals the denial of those post-conviction issues that were not the subject of the Rule 60(b) motion, i.e., the remaining issues.

II. Procedural History

Petitioner-Appellant John David Wurdemann was indicted on seven felony counts related to the attack of Linda LeBrane by four strangers on Interstate 84 in Canyon County, Idaho. He was initially represented by the Canyon county public defender, Klaus Weibe and Scott Fouser. He subsequently hired Van Bishop, who entered into the case just a few weeks prior to trial.

Wurdemann was tried and convicted by jury for (1) conspiracy to commit robbery, (2) robbery, (3) conspiracy to commit first degree kidnapping, (4) first degree kidnapping, (5) aggravated battery, (6) aiding and abetting first degree arson, and (7) aiding and abetting attempted first degree murder. The district court sentenced Wurdemann to fixed life on each of the first four counts just listed; a fixed 15 year sentence on the 5th count; a fixed

25 year sentence on the 6th count; and a fixed 15 year sentence on the 7th count. The district court ordered the seven sentences run concurrently; however, the court further ordered they run consecutive to previously-existing sentences stemming from two unrelated cases.

Wurdemann requested his trial attorney file a direct appeal, but Van Bishop did not do so. (*See* Transcript Post Conviction Evidentiary Hearing held August 2 & 4, 2011 (hereinafter "Tr, EH"), p.29 L.20 – p.30 L.8). After filing a post-conviction action based on counsel's failure to timely file an appeal, his direct appeal was reinstated. (*See* Clerk's Record of Trial (hereinafter "R. Trial"), Vol. II, pp.298-301, p.315, p.310, pp.324-327).

On February 6, 2004, Wurdemann filed an Amended Notice of Appeal. (See generally R. Trial, Vol. II, pp.329-332). The State Appellate Public Defender office ("SAPD") was appointed to represent Wurdemann on direct appeal. Two issues were raised, specifically (1) whether the district court erred in allowing a police officer, Detective Baker, to testify that a third party, Lynn Bumgardner, told him Wurdemann had a propensity for violence; and (2) whether the district court abused its discretion in imposing the maximum sentence for each of the seven convictions. The Idaho Court of Appeals affirmed the judgment of convictions and the sentences. *State v. Wurdemann*, Docket No. 30438, Opinion No. 370 (Ct. App. 2006)(unpublished).

Wurdemann then timely filed a *pro se* petition for post-conviction relief with the district court. (Clerk's Record of Post Conviction (hereinafter "R. PC), pp.6-12). The court appointed Van Bishop to review and investigate the petition for post-conviction relief and allowed the defendant twenty days to file an amended petition and gave notice of its intent to dismiss the petition. (R. PC, p.32). Van Bishop failed to respond whatsoever. (R.

PC, p.32). The court proceeded to appoint the Canyon County Public Defender's Office. (R. PC, p.33). Scott Fouser from that office began representing Wurdemann. (See generally, R. PC, pp.35-76). The court allowed Wurdemann to file an amended petition for post-conviction relief. (R. PC, pp.59-64). Scott Fouser was later appointed as private counsel with fees paid by the County. (R. PC, pp.77-82), but subsequently withdrew based on a conflict of interest. (R. PC, pp.91-92, pp.100-101). The court then re-appointed the Canyon County Public Defender's Office with attorney Mark Mimura representing Wurdemann. (*See generally*, R. PC, pp.108-111). Ultimately, attorney Brian Neville took over the representation, and represented Wurdemann for the remainder of the post-conviction proceedings including the evidentiary hearing. (See generally, R. PC, pp.111-164). Following an evidentiary hearing on the amended petition (during which time counsel withdrew three of the nine issues raised in the amended petition), the district court denied relief on all remaining claims.

SAPD was appointed to appeal the denial of the post-conviction but turned the case over to attorney Leo Griffard due to a conflict of interest. On July 20, 2012, Griffard filed a Rule 60(b) motion, in which Wurdemann asserted he unknowingly withdrew three critical claims including that his conviction was wrongfully obtained based upon suggestive lineups and misidentification. The district court granted the Rule 60(b) motion and scheduled an evidentiary hearing. Griffard withdrew from the case, and attorney Elisa G. Massoth was appointed. Following the evidentiary hearing, the district court granted relief on those claims in the post-conviction petition having to do with identification and vacated Wurdemann's convictions and sentences. (See Attachment B (Canyon County case no.

CV-2003-4362, Order on Petition for Post Conviction Relief filed June 8, 2015)). The State is appealing that decision in companion case docket no. 43384-2015.

III. Statement Of Facts

In the early morning hours of June 15, 2000, four people in another vehicle forced Linda LeBrane to stop her car along Interstate 84 in Canyon County, Idaho. The four – 3 men and 1 woman – were unknown to LeBrane. The strangers demanded money and drugs and forcibly drove her to a dark field along a country road. LeBrane was robbed, stabbed, and hit on the head with a baseball bat. Her car was set on fire. LeBrane was then left in a field, where she was ultimately found and taken for treatment. *See State v. Wurdemann*, Docket No. 30438 (Ct. App. 2006, unpublished opinion no. 370).

The police had no solid leads for approximately two years. (Transcript of Trial (hereinafter "Tr. Trial"), p.630, Ls.3-9). Initially, LeBrane, with the assistance of others, helped compile sketches of the attackers. Periodically, the police would show LeBrane a photographic lineup, and LeBrane would invariably identify someone as her attacker. (Tr. Trial, p.623, L.18 – p.627, L.12; p.633, L.18 – p.647, L.16). The identifications were incorrect; and no arrests were made. *See State v. John Wurdemann*, Docket No. 30438, Opinion No. 370 (Ct. App. 2006)(unpublished), p.2 (describing prolonged investigation that included several misidentifications by LeBrane).

In March 2002, LeBrane identified more people as her attackers, including John Wurdemann, his brother Kenneth Wurdemann, Jeremy Sanchez, and Sarah Pearce. (See Tr. Trial, p.645, L.8 – p.649, l.20). LeBrane respectively referred to the four as the "greasy man," the "fat boy," the "little boy," and "the woman." The four suspects were indicted on March 20, 2002, each on all seven charges described earlier. (R. Trial, Vol. I, pp.20-

27). The identification of Wurdemann was based on a video line-up that was highly suggestive and improper. (*See* Attachment B, pp.6-7). The identification was also flawed because LeBrane was high on marijuana at the time of the attack, she suffered traumatic head injury during the attack, she was unconscious for part of the attack, she was attacked in the dark, two years had elapsed between the attack and her identification of Wurdemann during which time she was undergoing psychiatric care, and she was confusing "facts" presented in a television reenactment and through sketch artistry with the actual events and memories of the attack. (Tr. Trial p.596 L.15 – p.597 L.1 (hit by baseball bat on base of skull and lost consciousness); p.586 Ls.11-12 (had smoked marijuana prior to attack); p.630 Ls.3-9 (waiting 25 months for case to be solved while undergoing psychiatric care); p.661 L.24 – p.663 L.18 (left Baker City around midnight and didn't stop until beginning of attack); pp.626-627 (discussing America's Most Wanted taping).

Three weeks prior to trial, Wurdemann retained private counsel Van Bishop. Van Bishop did not ask for an extension of time to prepare for trial. Despite the complexity and seriousness of the case, Van Bishop only met with his client for about 30 minutes at the prison and about another 30 minutes the night before trial. (Tr. EH, p.28 Ls.12-24). Neither initial trial counsel nor Van Bishop challenged the admissibility of eyewitness testimony, including that of LeBrane, even though there was ample evidence of law enforcement's use of misleading and suggestive lineup techniques, and evidence that LeBrane and other eyewitnesses' identifications were highly suspect. (*See generally*, Attachment B).

A three day jury trial commenced on August 13, 2002. During jury selection, Van Bishop did not challenge for cause or use a preemptory strike on juror no. 328, even though

the juror worked with law enforcement and knew many of the investigating officers. (Tr. Trial, p.180 L.18; p.121 L.8; p.121 Ls.5-8). Van Bishop also did not challenge, strike, or even question juror no. 444, even though that juror acknowledged being friend with a Nampa police officer and acquaintances with several other police officers. (Tr. Trial, p.159 Ls.15-24). From his opening statement and throughout the trial, Van Bishop referred to Wurdemann as "the greasy man," to the jurors. The State did the same.

The defense called Lynn Bumgardner to testify. Bumgardner had a relationship with Kenneth Wurdemann, and they lived in South Carolina. Bumgardner testified that she and Kenneth came to visit Idaho in June 2000, but Kenneth did not have any contact with John Wurdemann until at least June 19, 2000, four days *after* the attack on LeBrane. (Tr. Trial, p.864, L.12 – p.866, L.15; p.867, Ls.5-17; p.868, Ls.4-8). On cross-examination, the State questioned Bumgardner about statements she allegedly made to South Carolina Detective Baker wherein she described Wurdemann as having a propensity for violence and the attack was something Wurdemann was capable of. Bumgardner denied having made those statements. (Tr. Trial, p.875 L.23 – p.876 L.4).

The State called Detective Baker as a rebuttal witness. Baker testified that Bumgardner told him that Wurdemann "was capable of any violence," that she had known him to commit violent acts, that the attack of LeBrane "sounded like something he would do," and "she would not put anything past John David [Wurdemann]." (Tr. Trial, p.888 Ls.8-17). Van Bishop objected on hearsay grounds, but was overruled. (Tr. Trial, p.887 L.20 – p.888 L.5).

The jury found Wurdemann guilty on all seven counts. The district court sentenced him to four life sentences, two fixed 15-year sentences, and a fixed 25-year sentence.

ISSUES PRESENTED ON APPEAL

VII. Whether The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Continually Referring To Wurdemann As "The Greasy Man"

VIII. Whether The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Challenge Juror No. 328 For Cause Or Exercise A Preemptory Strike Even Though The Juror Was Employed By The Nampa Police Department

IX. Whether The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Question Or Challenge Juror No. 444 About The Juror's Friendship With A Nampa Police Officer As Well As The Juror's Acquaintances With Other Police Officers

X. Whether The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Request A Limiting Instruction Upon Admission Of Detective Baker's Testimony About Lynn Bumgardner's Allegedly Inconsistent Statements About Petitioner's Violent Character, And In Failing To Request A Jury Instruction Explaining That Detective Baker's Testimony About What Lynn Bumgardner Had Said Could Be Considered For Impeachment Purposes Only

XI. Whether The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Move For Judgment Of Acquittal On Count Six Of The Indictment, As There Was Insufficient Proof Of The Crime Of [Aiding And Abetting] First Degree Arson; Or In Denying The Alternative Claim That Appellate Counsel Was Ineffective For Failing To Raise That Issue

XII. Whether All Or Some Claims Constitute Cumulative Error

STANDARD OF REVIEW

I. Standard Of Review On Appeal From Post-Conviction

The standard of review of the denial of post-conviction is well established. An application for post-conviction relief is a special proceeding, civil in nature. *State v. Bearshield,* 104 Idaho 676 (1983). In order to prevail in such an action, the applicant must prove his allegations by a preponderance of the evidence. *Stuart v. State*, 118 Idaho 865 (1990). When reviewing a decision denying a petition for post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65 (Ct.App.1990). When faced with mixed questions of fact and law, the appellate court defers to the factual findings made by lower courts if those determinations are based upon substantial evidence, but exercises free review of the application of the relevant law to those facts. *Young v. State*, 115 Idaho 52 (Ct.App.1988); *Murray v. State*, 121 Idaho 918, 921-22 (Ct.App.1992). Constitutional issues are questions of law subject to free review, *State v. Weber*, 140 Idaho 89 (2004), as are the propriety of jury instructions. *State v. Statton*, 136 Idaho 135, 136 (2001); *Clark v. Klein*, 137 Idaho 154, 156 (2002).

II. Standard For Ineffective Assistance Of Counsel Claims

A defendant in a criminal case is guaranteed the effective assistance of counsel under both the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution. A claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington* standard. *Strickland*, 466 U.S. 668 (1984). In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in

that it fell below standards of reasonable professional performance, and 2) that this deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 689.

The prejudice prong of an ineffective assistance claim is established if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Vansickel v. White,* 166 F.3d 953, 958-59 (9th Cir.1999) (quoting *Strickland* at 694).

The prejudice prong of *Strickland* is clearly objective. *See Strickland*, 466 U.S. at 694 (to establish prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *see also Campbell v. State*, at 547-548 (following a post-conviction evidentiary hearing involving ineffective assistance of counsel claim, the appeals court exercises free review over legal conclusions); *Carter v. State*, 108 Idaho 788, 795 (1985)(demonstrating that Idaho Supreme Court addresses the legal merits of a denied ineffective assistance of counsel claim denied by post-conviction court, and makes the legal determination of the probable outcome of a suppression motion anew).

A criminal defendant is likewise entitled to the effective assistance of counsel on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985)(holding a criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal under the Due Process Clause of the Fifth Amendment). The failure to raise an issue on appeal may be deficient on its face. *See United States v. Reinhart*, 357 F.3d 521 (5th Cir. 2004)(appellate counsel ineffective for failing to raise meritorious sentencing guidelines issue which would have resulted in lesser sentence); *Brown v. United States*, 167 F.3d 109

(2nd Cir. 1999)(appellate counsel ineffective for not raising obviously deficient jury instruction).

I. The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Continually Referring To Wurdemann As "The Greasy Man"

A. Introduction to Claim

During the course of the investigation, Linda LeBrane used the terms "Greasy Man," "Fat Boy", "Little Boy," and "the woman" to refer to her four attackers. Eventually, after selecting numerous suspects in error, she used the term "Greasy Man" to refer to Wurdemann, "Fat Boy" to refer to Kenneth Wurdemann, "Little Boy" to refer to Jeremy Sanchez, and "the woman" to refer to Sarah Pearce. (Tr. Trial p.572 Ls.12-15; p.581 Ls.8-9; p.608 Ls.21-24; p.608 Ls.15-18).

Correctly recognizing the highly prejudicial nature of using "Greasy Man" to describe his client, Wurdemann's original public defender filed a motion to strike the reference to Wurdemann as the "Greasy Man" from the indictment. (R. Trial, Vol. I, pp.78-79 (arguing the names used in the Indictment are "derogatory, highly prejudicial and designed to inflame passion and prejudice against the defendant.") As to Wurdemann, the motion was granted. (R. Trial, Vol. I, pp.138-140). Retained trial counsel, Van Bishop, failed to file a similar motion to preclude the use of the term "Greasy Man" to identify and refer to Wurdemann in front of the jury. In all, the term or its likeness was used approximately 50 times in front of the jury. (Tr. EH, p.17 Ls.17-19).

During post-conviction, Wurdemann claimed trial counsel was ineffective for allowing this to occur. (R. PC, p.55 ("After previous counsel had filed a motion (which was granted) to strike the reference to petitioner as 'Greasy Man' in the Indictment, trial

counsel continually referred to petitioner by suing the prejudicial name of 'Greasy Man'....)).

The district court denied the claim on the basis that the term was not actually used by trial counsel to refer to Wurdemann and that trial counsel made a strategic choice that was "virtually unchallengeable." (Tr. EH, p.121 L.20 – p.123 L.14). This Court must reject that reasoning.

B. Counsel has a Duty of Loyalty to His Client

A criminal defense attorney has a duty of loyalty to his client and an "overarching duty to advocate the defendant's cause." *Strickland*, 466 U.S. at 688. Insulting the client may breach that duty and constitute ineffective assistance. *See, e.g., Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003)(granting habeas petition where counsel ridiculed petitioner's post-arrest statement, which cast doubt on his client's credibility before the jury); *Horton v. Zant*, 941 F.2d 1149, 1462 (11th Cir. 1991)(defense counsel told jury his client was not a very good person, was worthless, and expressed hatred toward him).

Using a pejorative term to refer to a criminal defendant can undermine the adversarial process to the extent the trial cannot be relied on as having produced a just result. *Ex parte Guzmon*, 730 S.W.2d 724, 733 (Texas Ct. Criminal Appeals 1987)(en banc). In *Guzmon*, defense counsel repeatedly referred to the client as a "wetback," during voir dire and during closing arguments. The court found both deficient performance and prejudice, stating "it may have been difficult for the jury to realize whose side defense counsel were on." *Guzmon* at 733.

C. The District Court Erred in Dismissing this Claim because Van Bishop Breached his Duty of Loyalty to Wurdemann in such an Egregious Manner that it Undermined Confidence in the Outcome of Wurdemann's Trial

1. Trial counsel's repeated use of "Greasy Man" fell well below the standard of reasonable professional performance

Trial counsel first used the term "Greasy Man" in his opening statement. (Tr. Trial, p.317 Ls.3-4 (Van Bishop telling jury that LeBrane called the person later identified as Wurdemann the "Greasy Guy" or "Greasy Man"). The term was then repeatedly used throughout the trial. This failure was egregious and fell well below any standard of professionalism. "Greasy" is a highly pejorative term. Previous trial counsel, who moved to strike the term from the indictment, correctly recognized the term was "derogatory, highly prejudicial and designed to inflame passion and prejudice against the defendant." (R. Trial, Vol. I, pp.78-79). The trial court agreed because the motion was granted. (R. Trial, Vol. I, pp.138-140).

2. The use of the term was so pervasive that it undermined the adversarial process

Once trial counsel used the term "greasy man," it's use became overwhelming. *See, e.g.*, Tr. Trial p.526 Ls.14-18 (by defense, witness describing composite as person LeBrane referred to as "the greasy guy"); p.572 Ls.12-16 (LeBrane testifying,"And the man that I called 'Greasy Man,' who I now know is John Wurdemann..."); p.572 L.20-21 (LeBrane testifying she dragged "Greasy Man" for a couple of feet); p.574 Ls.7-9 (LeBrane testifying, "I was sitting in the passenger seat and Greasy Man – John Wurdemann – got in the driver's seat and they drove me off somewhere."); p.574 Ls.23-25 (LeBrane responding to question of who drove her vehicle with, "Greasy Man. John Wurdemann."); p.576 L.12 (LeBrane testifying about actions of "Greasy Man"); p.577 L.11 and L.13 (same); p.581 L.11 (same); p.581 L.24 (LeBrane testifying, "So then Greasy Man, John Wurdemann, ..."); p.582 L.17 (LeBrane testifying "Because Greasy man was in the driver's seat...");

p.584 Ls.8-10 (LeBrane describing "Greasy Man" as having stabbed her four or five times by then); p.584 L.25 – p.585 (LeBrane testifying that the woman attacker "didn't look dirty and greasy like Greasy Man."); p.585 Ls.3-13 (LeBrane making two additional references to "Greasy Man"); p.592 Ls.9-21 (LeBrane testifying that "Greasy Man" – who she identified as "John Wurdemann" – was the first to cut her); p.593 Ls.6-9 (LeBrane testifying "Greasy Man" took her wedding ring off her finger); p.594 Ls.22-23 (LeBrane testifying, "...and John I called 'Greasy Man' because he was so dirty."); p.596 L.1 (LeBrane referencing "Greasy Man"); p.597 L.24 (same); p.598 Ls.6-7, Ls.15-17 (same); p.606 L.25 (same); p.607 Ls.19-25 (LeBrane describing the exhibit she was holding as an exhibit as "I have Greasy Man, John Wurdemann."). The term was used about 50 times in front of the jurors. Under these circumstances, "it may have been difficult for the jury to realize whose side defense counsel were on." *See Guzmon* at 733.

3. The District Court erred in denying the claim

The district court's finding that the trial counsel didn't actually refer to Wurdemann as the "Greasy Man" is unconvincing. Linda Lebrane identified Wurdemann as the attacker to whom she referred in her police interviews. Therefore, every time the phrase was used, Wurdemann was that man.

Moreover, the district court was mistaken in finding trial counsel made a tactical decision. The fact that LeBrane used the term to attempt to separate the identities of her attackers is not a reasonable explanation for trial counsel's repeated use of the phrase. Counsel has a duty to zealously represent his client. Trial counsel had a duty to present his client in the most favorable light possible, not acquiesce to the victim's pejorative and prejudicial nomenclature.

II. The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Challenge Juror No. 328 For Cause Or Exercise A Preemptory Strike Even Though The Juror Was Employed By The Nampa Police Department

A. Introduction to Claim

The district court erroneously denied Petitioner's claim that counsel rendered ineffective assistance of counsel in failing to strike juror no. 328, even though the juror worked for the Nampa Police Department and was familiar with officers involved in the prosecution of Wurdemann.

B. A Criminal Defendant is Constitutionally Entitled to an Impartial Jury

It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant the right to an impartial jury. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The bias or prejudice of even a single juror is enough to violate that guarantee." *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000)(holding district court was obligated to excuse juror for cause, under either implied or express bias theory); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966)(stating that a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). To disqualify a juror for cause requires a showing of either actual or implied bias-that is bias in fact or bias conclusively presumed as a matter of law. *Gonzalez*, 214 F.3d at 1111. Idaho Code defines actual bias as "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality." I.C. § 19-2019;[1] *see also Gonzalez*, 214 F.3d at 1112. The presence of a biased juror cannot be

[1] Idaho Code defines implied bias as "such a bias as, when the existence of the fact is ascertained, in judgment of law disqualifies the juror." I.C. § 19-2019. Idaho Code purports to restrict the grounds on which implied bias may be found. I.C. § 19-2020 (restricting

harmless; the error requires a new trial without a showing of actual prejudice. *Gonzalez*, 214 F.3d at 1111(internal quotations omitted); *citing United States v. Martizez-Salazar*, 528 U.S. 304, 316 (2000)(noting that "the result in the seating of any juror who should have been dismissed for cause...would require reversal.")

When trial counsel fails to adequately question or challenge a juror who expresses bias, counsel is ineffective. *Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004)(finding trial counsel ineffective for failing to adequately question or challenge juror who stated she would be "partial" to key state witness.) Counsel's failure to conduct adequate questioning or challenge an actually biased juror cannot be justified by strategy because it amounts to a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury. *Id.* at 675-676. "The question of whether to seat a biased juror is not a discretionary or strategic decision." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001)(finding ineffective assistance of counsel where juror made express admission of actual bias with no rehabilitation by counsel or the court.)

Because the presence of a biased juror cannot be harmless, prejudice is presumed for purposes of the *Strickland* analysis. *Miller*, 385 F.3d at 676. As the *Hughes* court explained, "[t]he question of whether to seat a biased juror is not a discretionary or strategic

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challenges for implied bias to nine specified grounds and no other); *see also State v. Santana*, 135 Idaho 58, 63 (Ct. App. 2000)(holding district court erred in removing juror for implied bias on grounds not listed in I.C. § 19-2020). However, to the extent those grounds are more restrictive than the requirements of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment, the statute is unconstitutional. *See, e.g.*, *Hunley v. Godinez*, 975 F.2d 316 (7th Cir. 1992)(granting habeas relief and holding that jurors were impliedly biased as a matter of law where jurors' hotel room was burglarized during deliberations in murder-burglary case.)]

decision." Failing to challenge a biased juror is tantamount to waiving a defendant's right to an impartial jury:

> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois,* 484 U.S. 400, 417 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a "structural defect in the constitution of the trial mechanism" that defies harmless error analysis, *Johnson,* 961 F.2d at 756 (quoting *Arizona v. Fulminante,* 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)), to argue sound trial strategy in support of creating such a structural defect seems brazen at best. We find that no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Hughes, 258 F.3d at 463. *See also Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992)(holding counsel's failure to challenge seating of obviously biased jurors "constituted ineffectiveness of counsel of a fundamental degree" and stating that because "[t]rying a defendant before a biased jury is akin to providing him no trial at all" the failure "constitutes a fundamental defect in the trial mechanism itself.")

C. The District Court Erred in Dismissing this Claim because Trial Counsel made No Attempt to Ascertain the Juror's Biases

Juror 328 was employed by the Nampa Police Department as a community service officer. (Tr. Trial p.120, L.18 p.121 L.8). She knew the Nampa police officers "quite well." (Tr. Trial p.121, Ls.5-11). Trial counsel failed to ask a single follow-up question about the juror's views about police officers or how the juror would assess the credibility of colleagues. (*See generally*, Tr. Trial pp.192-193).

Trial counsel's speculation at the evidentiary hearing that the juror's relationship with the Nampa Police Department led him to believe "she could be an advantageous rather than a negative juror" was just that – speculation. (Tr. EH p.49 Ls.21-25).

The district court denied the claim, and endorsed trial counsel's incredulous claim that "people with knowledge of competent police work are usually more critical of police errors and would be able to point that out to the rest of the jury." (Tr. EH p.124, L.20 – p.125 L.23). The district court is mistaken in its endorsement. Trial counsel never asked any questions about the juror's familiarity with investigative techniques and had no reason to believe the juror would even know what "competent police work" entailed – much less be critical of any investigative failures. Strategic decisions must be based on reasonable investigation. "[I]t is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Strickland*, 466 U.S. at 691.

In this case, there was no attempt to ascertain the juror's beliefs about police officers' credibility or the juror's knowledge of investigative techniques. Here, because trial counsel made no reasonable investigation of the juror's beliefs regarding the credibility of police officers, counsel could not have made a reasonable tactical decision.

Because failing to challenge a biased juror is tantamount to waiving a defendant's right to an impartial jury and cannot be held harmless, this Court must reverse the district court's denial of the claim.

III. The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Question Or Challenge Juror No. 444 About The Juror's Friendship With A Nampa Police Officer As Well As The Juror's Acquaintances With Other Police Officers

A. Introduction to Claim

The district court erroneously denied Petitioner's claim that counsel rendered ineffective assistance of counsel in failing to strike juror no. 444, even though the juror was friends with a Nampa police officer and was acquainted with other police officers.

B. A Criminal Defendant is Constitutionally Entitled to an Impartial Jury

The law regarding biased jurors and trial counsel's duty to adequately question or challenge that juror is set forth in Section II(B), above.

C. The District Court Erred in Dismissing this Claim because Trial Counsel made No Attempt to Ascertain the Juror's Biases

Juror 444 was family friends with a Nampa police officer and knew several other police officers. (Trial Tr., p.159 Ls.15-24). Again, trial counsel failed to ask a single follow-up question about the juror's views about police officers or how the juror would assess the credibility of colleagues. (*See generally*, Tr. Trial pp.192-193).

As with Juror 328, the district court denied the claim, reasoning that trial counsel made a strategic decision. (Tr. EH p.126 Ls.3-24). As with the previous claim, however, trial counsel never asked any questions about the juror's familiarity with police procedures and had no reason to believe the juror would be able to criticize the investigative techniques used. Again, then, there cannot be a reasonable strategic decision without any reasonable inquiry. *See Strickland*, 466 U.S. at 691.

IV. The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Request A Limiting Instruction Upon Admission Of Detective Baker's Testimony About Lynn Bumgardner's Alleged Statements About Petitioner's Violent Character, And In Failing To Request A Jury Instruction Explaining That Detective Baker's Testimony About What Lynn Bumgardner Had Said Could Be Considered For Impeachment Purposes Only

A. Introduction to Claim

The defense offered testimony of one witness only, Lynn Bumgardner. Lynn, had been the fiancé of Kenneth Wurdemann, the defendant's brother, and was brought in from South Carolina to testify for [John] Wurdemann. (*See generally* Tr. Trial, pp.862-864). She testified that Wurdemann and his brother did not see one another between June 6, 2000, and July 21, 2000. Linda LeBrane's attack occurred on June 15, 2000. (Tr. Trial, p.864 Ls.3-14 (arrived in Nampa on June 6, 2000); p. 867 Ls.9-17 (the brothers did not see each other from the time Lynn and Kenneth arrived in Nampa until approximately July 21, 2000)).

On cross-examination, the State asked Bumgardner if, during an interview in South Carolina with Detective Baker, she had said Wurdemann was violent and capable of the kind of attack perpetrated against LeBrane. Bumgardner denied making those statements. (Tr. Trial, p.875 L.12 – p.876 L.4). Trial counsel objected, but only on the grounds that the testimony exceeded the scope of direct examination, and the court overruled the objection. (Tr. Trial, p.875 Ls.17-21). Following Bumgardner's testimony, the defense rested.

The State then presented rebuttal testimony from Detective Baker. Baker was a detective with the York County Sheriff's Office in South Carolina, and had interviewed Bumgardner at the request of Canyon County law enforcement. (Tr. Trial, p.881 L.16 –

p.882, L.5). Baker testified that Bumgardner told Baker that "she believed that John David Wurdemann was capable of any violence," that she had "reported other instances of violence that she knew that he had committed," and "she said that it sounded like something he [John] would do." After Baker described the attack of LeBrane to Bumgardner, Baker claimed Bumgardner told him "she would not put anything past John David," and "[s]he knew him to be a violent person." (Tr. Trial, p.888 Ls.7-17). The defense objected – first on the grounds that previous instances of violence were not responsive and not relevant to the time period of the attack, then objected on the grounds that the questioning called for hearsay and speculation. (Tr. Trial, p.887 Ls.20-25). The court overruled the objection on the basis it was being admitted to attack Bumgardner's credibility. (Tr. Trial, p.888 Ls.3-5). The court did not give any limiting instruction to the jury.

B. Applicable Rules of Evidence Required Limiting Instructions or Preclusion of Detective Baker's Testimony Regarding Bumgardner's Alleged Statements

1. Idaho Rule of Evidence 105 Requires Limiting Instructions upon Request

Upon request of counsel, Idaho Rule of Evidence 105 requires a trial court to restrict the evidence to its proper scope and instruct the jury accordingly when evidence which is admissible for one purpose but not admissible for another is admitted. I.R.E. 105. It is reversible error for the court to deny such a request. In *State v. Cordova*, 137 Idaho 635 (Ct. App. 2002), the appellate court held the district court erred in denying the defendant's request for a limiting instruction regarding an officer's statements contained in a videotaped interview of the defendant. On the video, the officer accused the defendant of lying. The officer's statements were admissible only to provide context for the defendant's answers, not for the truth of the matter asserted, i.e., that the defendant was in fact lying. *Cordova*, at 641. Once error is found the appellate court must determine whether the error

affected the defendant's rights or was harmless which requires the court to ask whether it appears, beyond a reasonable doubt, that there was no reasonable possibility that the error contributed to the conviction. *Cordova* at 642.

2. Idaho Rule of Evidence Rule 403 Requires Exclusion of Evidence that is Unduly Prejudicial and Rule 404(b)

Idaho Rule of Evidence Rule 403 states that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." I.R.E. 403. Rule 404(b) disallows evidence of a defendant's other crimes, wrongs or acts to show action in conformity therewith. I.R.E. 404(b).

The policy underlying Rule 404(b) was the protection of the criminal defendant. *State v. Grist*, 147 Idaho 49, 52 (2009). "The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *Id.*, quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978). The drafters of I.R.E. 404 (b) were careful to guard against the admission of evidence that would unduly prejudice the defendant, while still allowing the prosecution to present probative evidence. *Grist* at 52.

When offered for a permitted purpose, the admissibility of evidence of other crimes, wrongs, or acts is subject to a two-tiered analysis. First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact. *Grist* at 52. The trial court must determine whether the fact of another crime or wrong, if established, would be relevant to a material and disputed issue concerning the crime charged, other than propensity. *Id.* Second, the trial court must engage in a balancing under

I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Id.*

C. The District Court Erred in Denying This Claim because Trial Counsel was Ineffective in not Requesting Limiting Instructions and for Failing to Object that the Alleged Hearsay Statements as Unduly Prejudicial

1. The failure to request limiting instructions pursuant to I.R.E. 105 was ineffective and prejudicial and the district court erred in denying the claim

Trial counsel could have requested and received an instruction limiting the scope of the evidence to impeachment of the defense witness both at the time of the testimony and in final jury instructions. *See State v. Osterhoudt*, 155 Idaho 867 (Ct. App. 2013); *Matthews v. State*, 130 Idaho 39, 46 (Ct. App. 1998). He did not do so.

But for counsel's failure to request the instructions, there is a reasonable probability that the outcome would have been different. Detective Baker's testimony was devastating – it not only called the veracity of the defense's only witness into question, it portrayed Wurdemann as an extremely violent man, who had committed violent acts in the past, and who was more than capable of committing the crimes at issue. The jury had no guidance whatsoever for this testimony. (*See* Tr. Trial, p.888 Ls.1-5 (providing no explanation of the limited consideration to be given the testimony and not explanation of the word "impeach")). Thus, trial counsel's failure to request limiting instructions at the time of Detective Baker's rebuttal testimony and upon submission of the case to the jury allowed the jury to consider damning evidence for improper purposes.

In denying this claim in post-conviction, the district court reasoned that the statements were admitted by the trial court "for impeachment purposes only." (Tr. EH, p.113 Ls.10-21. The facts relied upon are incorrect. If one looks closely at the trial transcript pages 887 and 888 referenced by the district court, it is plain that the trial court

did not explain the limited nature of the testimony to the jurors. The district court also reasoned that trial counsel declined to ask for an additional jury instruction because "he felt it would only emphasize the testimony and draw attention to it." (Tr. EH, p.113 L.23 – p.114 L.1. This too, fails to take into account that the jury never knew the limitations they should have placed on this testimony and could well have considered the statements for the truth of the matters asserted. There is no doubt that the jury was well aware of the testimony – it completely undermined the defense's only witness. It therefore cannot be a reasonable tactical decision to fail to ask for limiting instructions.

2. The failure to move to exclude the testimony pursuant to I.R.E. 403 was ineffective and prejudicial and the district court erred in dismissing the claim[2]

Trial counsel should have moved to exclude the testimony of Detective Baker regarding the alleged hearsay statements of Lynn Bumgardner under Idaho Rule of Evidence Rule 403, as it statement's probative value were substantially outweighed by the danger of unfair prejudice. Trial counsel's failure to object under the most basic rules of evidence fall well below the professional standards of conduct of a trial attorney.

The failure was prejudicial, because the trial court would have been compelled to exclude the testimony. First, the trial court would have had to have made the determination that there was sufficient evidence to establish the statements as true. This would not have happened. Detective Baker interviewed the witness Lynn Bumgardner, and had her sign a written statement. (Tr. Trial, p.881 L.15 – p.882 L.2). The written statement, however, did not contain any of the alleged hearsay statements made by Bumgardner to Baker. (Tr. Trial, pp.888 - 892). This calls into question the very existence of such statements.

[2] The district court raised this issue *sua sponte* in post-conviction. (Tr. EH, p.127 Ls.20-22 ("Petitioner argues that counsel was ineffective for failing to object to the statements as unduly prejudicial...")

Second, it is impermissible to introduce the fact of another crime or wrong to establish propensity. *Grist* at 52. Bumgardner's alleged statements were obviously tied to Wurdemann's propensity for violence.

Third, even if relevant, the danger of unfair prejudice clearly and substantially outweighs the probative value of the Bumgardner's alleged statements. Indeed, the Idaho Court of Appeals said that Baker's testimony that Bumgardner said the attack on LeBrane "sounded like something Wurdemann would do," was "a damning assessment of Wurdemann from someone who knew him." *State v. Wurdemann*, docket No. 30438, Opinion No. 370 (Ct. App. 2006)(unpublished).[3]

D. Conclusion

Trial counsel's failures to object on the most rudimentary of grounds and failure to seek instructions limiting damning testimony that eviscerated the testimony of their one and only defense witness prejudiced Wurdemann to such an extent as to undermine the reliability of the trial. Had the jurors not heard or considered Detective Baker's claims of Bumgardner's alleged hearsay statements, Wurdemann would not have been convicted.

V. The District Court Erred In Denying Wurdemann's Claim That Trial Counsel Provided Ineffective Assistance, In Violation Of The Sixth Amendment, In Failing To Move For Judgment Of Acquittal On Count Six Of The Indictment, As There Was Insufficient Proof Of The Crime Of Aiding And Abetting First Degree Arson; Or In Denying The Alternative Claim That Appellate Counsel Was Ineffective For Failing To Raise That Issue

A. Introduction to Claim

[3] The Court of Appeals claimed that Wurdemann's appellate attorney's conceded that this statement was admissible impeachment. The Court of Appeals decision is unclear on exactly what appellate counsel conceded or the scope of the concession. However, I.R.E. Rule 608 (b) precludes the use of extrinsic evidence to prove specific instances of conduct of a witness.

The State presented no evidence whatsoever to support the aiding and abetting first degree charged in the indictment and Petitioner was entitled to a judgment of acquittal on Count Six as a matter of law. Trial counsel was therefore ineffective in failing to move for a judgment of acquittal on this count, and appellate counsel was ineffective for failing to raise the issue on direct appeal.

B. If Every Element of a Crime Charged is not established Beyond a Reasonable Doubt, a Defendant is Entitled to a Judgment of Acquittal

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the criminal conviction of any person "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of a charged offense is constitutionally infirm. *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). There must be sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

Idaho Criminal Rule 29(s) mandates a trial court enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." I.C.R. Rule 29(a); *State v. Dietrich*, 135 Idaho 870, 873 (Ct. App. 2001)(reversing denial of motion for acquittal because evidence was insufficient as a matter of law without corroboration of accomplice's testimony). Review of a denial of a motion for a judgment of acquittal requires that the appellate court independently consider the evidence in the record to determine whether a reasonable mind could conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. *Id.*

C. The State did not Establish the Elements of Aiding and Abetting First Degree Arson, and Wurdemann was Entitled to a Judgment of Acquittal as a Matter of Law

1. Trial counsel was ineffective for failing to move for a judgment of acquittal

In order to be convicted for aiding and abetting the commission of a crime, a person must act in such a way as to facilitate, promote, encourage, solicit, or incite the actions of the crime. *State v. Mitchell*, 146 Idaho 378, 384 (Ct. App. 2008). Mere knowledge of a crime or assent or acquiescence in its commission does not create accomplice liability through aiding and abetting. *Id.*; *State v. Randles*, 117 Idaho 344, 347, overruled on other grounds by *State v. Humpherys*, 134 Idaho 657 (2000). Aiding and abetting contemplates a sharing by the aider and abettor of the criminal intent of the perpetrator. *Mitchell* at 384. The aider and abettor must have the requisite intent and have acted in some manner to bring about the intended result. *Id.*

First degree arson is a specific intent crime. I.C. § 18-802 ("Any person who willfully and unlawfully..."). Thus, intent is one of the material elements of the crime of first degree arson, and it must be proven beyond a reasonable doubt by the prosecution. "Willfully" means a purpose or willingness to commit the act at issue. I.C. § 18-101(1); *State v. Poe*, 139 Idaho 885 (2004).

In this case, there was no evidence to support the aiding and abetting first degree arson conviction. LeBrane testified that she knew someone set her car on fire because she "heard the flames" and "could feel the heat" on her legs. (Tr. Trial, p.600 Ls.18-20.) She was face down in the dirt at the time, pretending to be dead. (Tr. Trial, p.600 Ls.13-17). There was absolutely no evidence that Wurdemann "acted in some manner to bring about the intended result."

Trial counsel's failure to move for a judgment of acquittal is woefully ineffective. At the evidentiary hearing, trial counsel testified he didn't think the trial court would have granted a motion for judgment of acquittal on the aiding and abetting first degree arson charge. (Tr. EH, p.72 L.23 – p.73 L.11). He didn't indicate that he had even contemplated doing so, and shrugged it off with "[w]hat difference does it really make?"

How can a trial attorney believe an erroneous conviction does not matter? Counsel should have recognized that the elements had not been met and moved for acquittal.[4] A conviction is never of no consequence just because a defendant was convicted on multiple charges. *Mintun v. State*, 144 Idaho 656 (Ct. App. 2007)(finding ineffective assistance of counsel for failing to raise sufficiency of evidence claim regarding one of four counts of sexual abuse of a minor, where defendant was convicted on all four counts).

2. Appellate counsel was ineffective for failing to raise the issue on direct appeal

Likewise, Wurdemann's ineffective assistance of appellate counsel should not have been denied. The record was clear; no additional evidence was required to establish the failure to prove the elements of aiding and abetting first degree arson.

3. The district court erred in denying these post-conviction claims

In denying the ineffective assistance of trial counsel claim, the district court reasoned that counsel's decision was a strategic one because trial counsel had testified that "he thought it would have been counter to their defense because their defense was, yeah, a fire was started, but my client had nothing to do with it, he was not involved in the attack."

[4] The district court also seemed to approve of defense counsel's claim that a motion would have been counter to their defense. (Tr. EH, p.130 Ls.22-25). Obviously, the motion should have been made outside the presence of the jury.

(Tr. EH, p.130 L.22 – p.131 L.10). The district court also relied upon trial counsel's opinion that such a motion "would have been fruitless." (Tr. EH, p.130 Ls.18-21).

This is a matter of law over which this Court exercises free review. It is clear that the limited testimony regarding the fire did not support the elements of aiding and abetting first degree arson by Wurdemann. Trial counsel's beliefs otherwise are irrelevant.

In denying the ineffective assistance on appeal arguments, the district court acknowledged the claim should have been raised on appeal, but rejected the claim because the court "[didn't] know that this would have been of much consequence since this was – there were so many life sentences." Again, a conviction based on insufficient evidence is never harmless. *See Mintun* at 665. As argued above, appellate counsel was ineffective in failing to raise a sufficiency of the evidence claim, and the district court erred in denying the claim.

VI. The Totality of Some or All of the Claims Constitute Cumulative Error

Trial counsel's deficient performance, when viewed cumulatively, demand reversal of the denial of post-conviction relief.

The cumulative error doctrine requires reversal of a conviction when there is "an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process. *State v. Field*, 144 Idaho 559, 572-573 (2007)(reversing convictions after considering aggregation of errors). *See Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003)(explaining that cumulative error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless, and further explaining that the analysis encompasses all errors – including legally diverse errors).

In this case, the Court must consider all of the errors raised herein **and** those errors identified in the companion case in which Petitioner-Appellant is the Cross-Respondent to the State's appeal. *See* S.Ct. Docket No. 43384-2015 (Canyon County No. CV-2003-4362). Thus, the Court must consider the errors discussed above, in conjunction with the errors regarding the misidentification and failure to provide expert testimony. (See Attachment B).

Trial counsel unreasonably relied on the misidentification of his client without consulting an expert or seeking to suppress the misidentification. He also failed to provide effective assistance in showing misidentification to the jury through the use of experts. (See Attachment B). Thus, Wurdemann was now, de facto, the "Greasy Man." He was

judged by jurors with admitted ties to the Nampa Police Department and other police officers, but who were not questioned about any bias in favor of law enforcement. He was judged by jurors allowed unfettered discretion as to the legal significance of Detective Baker's testimony about the damning statements allegedly made to him by the defense's **only** witness. And to add insult to injury, trial counsel couldn't even be bothered to move for acquittal on aiding and abetting an arson, even though there was no evidence to support it; which was compounded by appellate counsel's failure to raise the issue on direct appeal. All of this evidence was presented to an improperly selected and instructed jury.

CONCLUSION

Trial counsel came into this most serious criminal case several weeks before trial. He met with his client twice, briefly, and adopted the description "Greasy Man." He did nothing to support his misidentification defense. He did not obtain expert identification assistance. He did not present expert identification testimony. He did nothing to ensure his client was tried by an unbiased jury. He put on one witness and then allowed Detective Baker to eviscerate her testimony. He did nothing to limit Detective Baker's testimony or to rehabilitate his only witness. He didn't bother moving for acquittal on the arson count. John Wurdemann received shamefully inferior representation that drastically impacted the outcome of the trail. The denial of post-conviction relief must be reversed.

Dated this 21 day of January, 2016

Elisa G. Massoth

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29 day of January, 2016, I caused a true and correct copy of the foregoing to be served, by the method(s) as indicated, upon:

Idaho Attorney General
Kenneth Jorgensen
700 W State St 4th Floor
P.O. Box 83720
Boise, Idaho 83729-0010
ken.jorgensen@ag.idaho.gov

- ✓ U.S. Mail
- o Hand Delivery
- o Electronic Mail
- o Facsimile 208-854-8074

Elisa G. Massoth

ATTACHMENT – A –

TO PETITIONER APPELLANT'S OPENING BRIEF

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOHN DAVID WURDEMANN, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV03-4362 **JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

On March 5, March 6, and March 17, 2015, Petitioner's remaining claims in his Amended Petition for Post-Conviction Relief came on before the Court for an evidentiary hearing. Petitioner appeared in person and through his counsel of record, Elisa Massoth. Respondent appeared through its counsel of record, Zachary J. Wesley, Deputy Prosecuting Attorney. The Court having entered its written Order on Petition for Post Conviction on June 8, 2015, and good cause appearing, THEREFORE,

IT IS HEREBY ORDERED, and this does ORDER, that JUDGMENT be, and is hereby, ENTERED, in favor of the Petitioner, John David Wurdemann, and against the Respondent, State of Idaho, as to Petitioner's ineffective assistance of counsel claims found in the first and second claim in the Petitioner's Amended Post Conviction Petition.

Petitioner, John David Wurdemann is entitled to post-conviction relief. His conviction and sentence imposed in Canyon County in Case No. CR2002-5739 upon the charges of Count I – Conspiracy to Commit Robbery; Count II – Robbery; Count III – Conspiracy to Commit First Degree Kidnapping; Count IV – First Degree Kidnapping; Count V – Aggravated Battery; Count VI – Aiding and Abetting First Degree Arson; and Count VII – Aid and Abet Attempted Murder in the First Degree is hereby VACATED.

Wurdemann is entitled to a new trial in the same case. Any new trial must commence within 210 days of any final order from the Idaho Supreme Court in this post-conviction case either affirming the Judgment of this court or dismissing any appeal from this Judgment filed by the State of Idaho. In the event the State of Idaho foregoes an appeal of this Judgment, trial must commence within 210 days of the date of the clerk's file stamp upon this Judgment.

Wurdemann is entitled to be released from custody upon posting bail securing his appearance in Canyon County Case No. CR02-5739 at such times as are necessary and ordered by the presiding judge, in the amount to be set in that case.

The portion of this Judgment granting Wurdemann a new trial is STAYED pending the outcome of any appeal to the Idaho Supreme Court, subject to any further order of the Idaho Supreme Court.

The portion of this Judgment vacating the conviction and sentence imposed in Canyon County in Case No. CR02-5739 upon charges of Count I – Conspiracy to Commit Robbery; Count II – Robbery; Count III – Conspiracy to Commit First Degree Kidnapping; Count IV – First Degree Kidnapping; Count V – Aggravated Battery; Count VI – Aiding and Abetting First Degree Arson; and Count VII – Aid and Abet Attempted Murder in the First Degree IS NOT STAYED by the District Court pending any appeal.

The portion of the Judgment granting Wardemann bail in Case No. CR02-5739 IS NOT STAYED by the District Court pending any appeal.

The portions of this Judgment NOT STAYED herein will be STAYED pursuant to I.A.R. 13(b)(8) and (14) for no more than fourteen (14) days from the date of the clerk's file stamp upon this Judgment upon filing of Notice of Appeal by the State of Idaho.

DATED this 20th day of July 2015.

RENAE J. HOFF
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of July, 2015, a true and correct copy of the foregoing **JUDGMENT** was served on the following in the manner indicated.

Elisa Massoth P. O. Box 1003 Payette, Idaho 83661 emassoth@kmrs.net	[X] U.S. Mail [ ] Email [ ] Facsimile [ ] Hand Delivery
Zachary J. Wesley Canyon County Prosecuting Attorney's Office 1115 Albany Street Caldwell, Idaho 83605	[ ] U.S. Mail [ ] Email [ ] Facsimile [X] Hand Delivery
Ken Jorgensen Deputy Attorney General P. O. Box 83720 Boise, Idaho 83720-0010	[X] U.S. Mail [ ] Email [ ] Facsimile [ ] Hand Delivery

Deputy Clerk

ATTACHMENT – B –

TO PETITIONER APPELLANT'S OPENING BRIEF

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOHN DAVID WURDEMANN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

ORDER ON PETITION FOR POST CONVICTION RELIEF

CV-2003-4362-C

Procedural History

The court incorporates all prior recitations of the procedural history of this action and the underlying criminal case. Relevant to this order, the court finds that on August 4, 2011, it issued an oral ruling dismissing all claims presented by the Petitioner's Post-Conviction Petition. A Final Judgment was filed on September 15, 2011. A Notice of Appeal was filed on September 13, 2011.

On July 20, 2012, the Petitioner filed a Motion for Relief from Judgment Pursuant to I.R.Civ.P. 60(b), along with a supporting memorandum. On August 6, 2012, the Idaho Supreme Court issued an Order Granting Motion to Suspend Briefing Schedule which ordered this court to consider the merits of the 60(b) motion and suspending the appeal until such time as that motion was resolved. On October 1, 2012, the State filed an Objection to Petitioner's Motion for Relief

from Judgment Pursuant to I.R.C.P. 60(b). On October 18, 2012, the Petitioner's Response to State's Objection to Motion for Relief from Judgment was filed. A motion hearing was held on June 27, 2013 and the court granted, on the record, the Motion for Relief from Judgment. The evidentiary hearing was conducted on March 5, 2015, March 6, 2015, and March 17, 2015. The Petitioner was present with counsel Elisa Massoth, and the State was represented by Zach Wesley, Canyon County Prosecuting Attorney. The Petitioner offered the testimony of David Resisberg, Van Bishop, Scott Fouser, Eric Lehtinen, and the Petitioner testified on his own behalf. The State offered the testimony of John Yuille.

Analysis

This matter comes before the court after an evidentiary hearing on issues raised in the Petitioner's 60(b) motion granted by this court, which allowed the Petitioner to proceed to post-conviction evidentiary hearing on the issue whether trial counsel was ineffective because the eyewitness identifications admitted at trial were not properly challenged at trial. In part, the court granted the I.R.C.P. 60(b) motion due to recent decisions from the Idaho Supreme Court in *State v. Pearce*, 146 Idaho 241; 192 P.3d 1065 (2008) and *State v. Almaraz*, 154 Idaho 584, 301 P.3d 242 (2011).

While there are a number of issues raised in the post-hearing briefing, the ultimate issue is whether Petitioner's attorneys were ineffective in failing to consult an expert, to call an expert as witness at trial, and to challenge the eyewitness identifications in a pre-trial motion. In an Ineffective Assistance of Counsel claim, a Petitioner must satisfy a two prong test that: 1) shows that Petitioner's counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). The

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id* at 686. *See State v. Charboneau*, 116 Idaho 129, 137, *cert denied*, 493 U.S. 922 (1989); *see also Gibson v. State*, 110 Idaho 631 (1986); *Paradis v. State*, 110 Idaho 534 (1986); *Carter v. State*, 108 Idaho 788 (1985). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Jakoski v. State*, 136 Idaho 280, 284 (Ct. App. 2001). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State,* 114 Idaho 758, 760 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id* at 761.

In determining whether trial counsel for the Petitioner were ineffective by failing to consult with and present an expert witness on the eyewitness identification, and identification procedures, as well as to challenge the eyewitness identifications in pre-trial motions, the court must look at the prevailing legal standards on this issue. In *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983) the Idaho Supreme Court addressed the due process concerns and the standards for suppression of in-court and out-of-court identifications. In relying on United States Supreme Court precedent, the Idaho Supreme Court stated that "the central question is 'whether under 'the totality of circumstances' the identification was reliable even though the [identification] was suggestive.'" *Id.* at 162, 26, quoting *Neil v. Biggers*, 409 U.S. 188 (1972). In considering the totality of circumstances, a court must determine if an identification is reliable based on the following factors: (1) the opportunity of the witness to view the criminal at the time

of the crime; (2) the witness's degree of attention; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification. *Id.* In *Hoisington*, after examining the totality of the circumstances and the factors above, the court upheld the admission of the identification testimony and also rejected the defendant's argument that an expert witness should have been allowed to testify regarding the reliability of eye witness identification. *Id.* at 165, 29.

In *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008), the Idaho Supreme Court addressed the appeal of one of the Petitioner's co-defendants, Sarah Pearce. On appeal, Pearce argued that the district court erred in excluding the testimony of a defense expert witness who would have testified regarding the police line-up procedures and the effect of those procedures on identifications. The Idaho Supreme Court set forth the legal requirements and considerations that are necessary to allow the testimony of an expert witness and agreed with the district court that "there are grounds for concern regarding various aspects of the lineup procedures, particularly the photo lineups, and though it would likely have been helpful to have testimony from an expert on the matters..." *Id.* at 247, 1071. However, the district court found and the Supreme Court agreed that the particular expert witness that Pearce sought to use was not sufficiently qualified in the specific areas of identification and his testimony was properly excluded. Therefore, the *Pearce* court displayed a differing view on the use of expert witnesses on this issue from the *Hoisington* court in that the Idaho Supreme Court indicated that the use of an expert witness in lineup procedures, identification and memory issues may be helpful to the trier of fact because there are issues raised that may be beyond the common understanding of the jury.

Also relevant to this court's decision is the recent Idaho Supreme Court decision in *State v. Almaraz*, 154 Idaho 584, 301 P.3d 242 (2013). In *Almaraz*, the Idaho Supreme Court addressed both identification procedures, as well as the use of an expert witness to challenge the specific lineup procedures used in producing the identification. In first addressing the police procedures used to identify the defendant, the Supreme Court applied the two-part *Hoisington* test as addressed above. *Id.* at 593, 251. The court also adopted "system variables" used to determine whether identification procedures are overly suggestive because these are factors within the control of the criminal justice system. *Id.* at 593-594, 251, 252. The court also adopted "estimator variables" which are the factors used to determine the reliability of the identification, again as addressed above in *Hoisington*. *Id.* at 595, 253. In *Almaraz*, the Idaho Supreme Court in applying these principles found that the district court erred by admitting the identification because the police procedures were overly suggestive and that these procedures were not outweighed by indicia of reliability. *Id.* at 598, 256.

In addition, the Idaho Supreme Court found that the district court erred by limiting the expert testimony of Dr. Reisberg on the identification procedures, including the overly suggestive conduct of law enforcement. *Id.* at 600. 258. In issuing this decision, the Idaho Supreme Court stated "this Court still recognizes that an expert cannot opine to the accuracy of the eyewitness identification or the credibility of any witness as those matters are reserved for the jury. However, an expert witness may testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony." *Id.* Specifically, the court stated "[t]estimony relating to the proper guidelines for conducting an accurate interview or lineup, whether or not those procedures were followed in the case at hand, and the consequences of non-compliance with those procedures does not invade the province of the jury." *Id.* Again,

the Idaho Supreme Court has recognized that expert witness testimony may be utilized by a defendant under these circumstances, and when there is evidence that police identification procedures have been overly suggestive and that the identification does not carry specific indicia of reliability.

At the Evidentiary Hearing, Petitioner offered the testimony of Scott Fouser and Van Bishop who were trial counsel for the Petitioner prior to and during the trial in the underlying criminal action. Scott Fouser testified that he was a Canyon County Public Defender who originally represented the Petitioner. He testified that a major issue in the case had to do with how the co-defendants were identified as suspects and defendants. He further testified that despite this being the major issue, he did not file any pre-trial motions related to identification and he did not retain an expert on behalf of the Petitioner to challenge the identifications.

The Petitioner's second trial counsel, Van Bishop, was retained prior to the trial by the Petitioner. Mr. Bishop testified that once he took over the case he determined that the primary issue in the case was going to be the identification of the Petitioner because of the Petitioner's assertion that he was not involved and not at the location of the incident. Mr. Bishop testified that it was his understanding that Ms. LeBrane made "substantial misidentifications...in lineups" and that the video lineup involving the Petitioner "was ridiculous. It was a pyramid right straight up , and John is in the center..." Despite identification being an issue for trial, Mr. Bishop testified that he did not seek to exclude the identifications in a pre-trial motion, and he did not retain an expert to address this issue but relied on cross-examination and argument to address the identification problems during trial.

Given this testimony, it is clear that both Mr. Fouser and Mr. Bishop were aware of the issues related to the line-ups and identifications of the Petitioner at trial, and that neither trial

counsel sought to challenge the line-ups or identifications in a pre-trial motion, and neither contacted or consulted with an expert witness on these issues. The court finds that both counsel were aware that the line-ups and identifications were likely not reliable and may have been produced under suggestive conditions; and under *Hoisington, supra*, these attorneys were ineffective by failing to take the necessary steps to challenge the line-ups and identifications properly. As will be more fully discussed below, the court cannot find that the adversarial process functioned properly given all the issues with the identifications that were readily apparent prior to and during the trial.

A related issue raised by the State is the argument that it was a strategic decision by Mr. Fouser and Mr. Bishop not to retain an expert or to challenge the identifications and line-ups in a pre-trial motion, and thus, the court should not second guess that strategic decision. The State argues that trial counsel pushed the matter to trial in order to avoid having one of the co-defendants testify against the Petitioner. However, the Petitioner argues that counsel's failure to act should not be considered a strategic decision, especially when it is clear that there was substantial prejudice to the Petitioner. In reviewing the testimony of both Mr. Fouser and Mr. Bishop, neither testified that the decision not to challenge the line-ups and identifications pre-trial or to fail to consult with an expert was a strategic decision. Rather the testimony is simply that these actions were not taken by trial counsel. This court finds that this was deficient performance by the attorneys at trial. The court does not interpret Mr. Bishop's testimony that he wanted the case to go to trial before the co-defendant would be available to testify against the Petitioner as explanation of why he did not do more to challenge the line-ups and identifications. The court will not presume that one strategic decision explains the lack of action on another trial issue, especially one as important as the identifications.

Therefore, the court finds and concludes that trial counsel's failure to consult with an expert witness and provide a proper challenge to the line-ups and identifications fell below an objective standard of reasonableness because both attorneys were experienced criminal defense lawyers, both had identified the line-ups/identifications as the primary issue to be addressed, and neither attorney was able to explain, in hindsight, why sufficient steps were not undertaken prior to trial to properly challenge the line-ups and identifications. Finally, neither attorney explained why an expert was not consulted about how best to challenge this evidence. The court finds that this conduct denied the Petitioner a proper functioning adversarial system.

The next consideration for the court is whether this failure by Petitioner's attorneys caused him prejudice and the court determines that the Petitioner has made a showing of prejudice. First, it is clear from the record that the State relied on a number of witnesses who identified the defendant, however, it is equally clear from the record that there were numerous issues and problems with most, if not all, of the identifications. Second, it is clear from the record that Linda LeBrane's identifications were problematic given the estimator and system variables discussed above and as testified to, at length, by Dr. Reisberg. Finally, the testimony of Dr. Reisberg clearly shows all the potential problems that existed with the video line up and other identification procedures undertaken by law enforcement and others during the investigation of this incident. While the court recognizes that these problems were apparent to trial counsel at the time of trial, and counsel did attempt to address these issues during trial, what was lacking at trial was someone, like Dr. Reisberg, to explain how the procedures could have influenced Ms. LeBrane in identifying the Petitioner, or how the video line-up was so clearly flawed that there was no reasonable outcome other than the Petitioner to be identified. The court finds that the record of the numerous issues with the line ups and identifications and the fact that

the Petitioner was convicted, in part if not fully, on the identifications shows that he was prejudiced by counsel's failure to either consult with an expert, call an expert witness, or otherwise properly challenge the identification procedures. The court finds that the Petitioner has met his burden on the Ineffective Assistance of Counsel claim raised in the Amended Post Conviction Petition and as presented to the court in the IRCP60(b) motion and the recent Evidentiary Hearing.

Dated this 8 day of June 2015.

Renae Hoff, District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on 8 day of June, 2015, s/he served a true and correct copy of the original of the foregoing ORDER on the following individuals in the manner described:

- upon counsel for petitioner:

  Elisa G. Massoth
  ELISA G. MASSOTH, PLLC
  PO Box 1003
  Payette, ID 83661

- upon counsel for respondent:

  Zachary J. Wesley
  CANYON COUNTY PROSECUTOR'S OFFICE
  1115 Albany St
  Caldwell, ID 83605

- and upon:

  Stephen W. Kenyon
  IDAHO SUPREME COURT
  PO Box 83720
  Boise, ID 83720-0101

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

CHRIS YAMAMOTO,
Clerk of the Court

By: _____
Deputy Clerk of the Court